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No. 80-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

T. BERTRAM LANCE,
Appellant,

versus

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from
The United States Court of Appeals
For the Fifth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Are the provisions of 2 U.S.C. §441b(a), formerly known as the Federal Corrupt Practices Act, that make it "unlawful for any national bank . . . to make a contribution or expenditure in connection with any election to any political office . . . ," overly broad and facially invalid under the First Amendment?

2. If §441b(a) is facially unconstitutional, does the appellant, a former bank officer who is being investigated for having violated its provisions in 1974, have standing to raise the unconstitutionality of the statute in defense to a subpoena enforcement proceeding brought by the Federal Election Commission?

3. Was it the intention of Congress that the May 1976 Amendments to the Federal Election Campaign Act be applied retroactively to political campaigns that ended in 1974 prior to the creation of the Federal Election Commission?

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

T. Bertram Lance (Appellant)

First National Bank of Calhoun, Georgia (lender of funds to Bert Lance for Governor Campaign; appellant is former president of this bank)

National City Bank of Rome, Georgia (lender of funds to Bert Lance for Governor Campaign)

Federal Election Commission (Appellee)

Common Cause (Amicus Curiae)

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit from which this appeal is taken, *Federal Election Commission v. T. Bertram Lance*, 617 F.2d 365 (5th Cir. 1980), and *Federal Election Commission v. T. Bertram Lance*, ____ F.2d ____, No. 78-1859 (5th Cir. Janu-

ary 15, 1981), are reproduced as Appendices A and B, respectively.

JURISDICTION

On January 19, 1981, the Court of Appeals entered a final judgment affirming an order of the district court in a proceeding brought by the Federal Election Commission under 2 U.S.C. §437a(b) that had granted enforcement of an administrative subpoena issued by the Federal Election Commission to appellant. A notice of appeal was filed by appellant in the Court of Appeals on February 2, 1981, and is reproduced as Appendix C. Motions by appellant for a stay of the mandate were denied by the Court of Appeals on February 19, 1981 and by Mr. Justice Powell on March 11, 1981.

Jurisdiction to review the decision of the Court of Appeals by direct appeal is conferred upon this Court by 2 U.S.C. §437h(b). *Buckley v. Valeo*, 424 U.S. 1 (1976). In the alternative, this Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari under 28 U.S.C. §2101(c).

THE STATUTE INVOLVED

The provisions of 2 U.S.C. §441b(a) in pertinent part provide:

> "(a) It is unlawful for any national bank, or any corporation organized by authority of any

law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commission to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

"(b) . . .

"(2) For purposes of this section and section 79l(h) of Title 15, the term 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, ad-

vance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, . . ."

2 U.S.C §441b.

STATEMENT OF THE CASE

In December 1977, the Federal Election Commission ("FEC") filed a petition in the district court pursuant to 2 U.S.C. §437a(b) seeking judicial enforcement of a subpoena served upon appellant T. Bertram Lance. The petition alleged that "Mr. Lance had been a candidate for Governor of Georgia in 1974" and that "on September 13, 1977 [the FEC] found reason to believe that violations of 2 U.S.C. §441b had been committed by the 1974 Bert Lance for Governor Campaign Committee and the Calhoun First National Bank, Calhoun, Georgia." R. 2.[1]

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1 The FEC was in full possession of all of the facts prior to service of its subpoena on Mr. Lance in November 1977. Mr. Lance has testified fully regarding these subjects before the Comptroller of the Currency in August 1975, and before the Senate Committee for Governmental Affairs in January 1977 and September 1977. *See Nominations of Thomas B. Lance and James T. McIntyre, Jr.: Hearings Be-*

The district court ordered the subpoena enforced over Mr. Lance's objections that the FEC's investigation of his 1974 campaign under 2 U.S.C. §441b(a) was unauthorized by law and beyond the jurisdiction of the FEC because his campaign had ended in 1974 *before* the creation of the FEC on January 1, 1975, and two years *before* the 1976 Amendments to the Federal Election Campaign Act ("FECA"), which enacted §441b(a) as a part of the FECA (the statute which Mr. Lance was accused of having violated), and enacted 2 U.S.C. §437g(a)(6), which created civil enforcement powers in the FEC. *See Cort v. Ash*, 422 U.S. 66, 74 (1975). It was Mr. Lance's position (1) that the FECA Amendments were prospective only and could not be applied retroactively to Mr. Lance's unsuccessful 1974 campaign for Governor of Georgia, (2) that any enforcement proceedings for violation of §441b(a) occurring during the course of his 1974 campaign were barred by the three-year statute of limitations of 2 U.S.C. §455, (3) that if §441b(a) were applied retroactively to Mr. Lance's 1974 campaign, the statute violated the *ex post facto* and due process clauses of the Constitution, and (4) that the

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fore the Committee on Governmental Affairs, United States Senate, 95th Cong. 1st Sess. 63-64 (Jan. 17-18, 1977); *Matters Relating to T. Bertram Lance: Hearings Before the Committee on Governmental Affairs, United States Senate (Part 4)*, 95th Cong. 1st Sess. 909-10 (Sept. 19, 1977). Two Reports of the Comptroller of the Currency regarding possible violations of 18 U.S.C. §610 by the Calhoun First National Bank were filed of record in the district court. *See* Memorandum prepared by the Enforcement and Compliance Section of the Comptroller of the Currency dated September 22, 1975 (R. 34), and the Comptroller of the Currency's official report entitled "Inquiry into Certain Matters Relating to T. Bertram Lance and Various Financial Institutions" dated August 18, 1977. R. 42.

FEC was already in possession of all of the information concerning the bank overdrafts by appellant's 1974 campaign. On February 10, 1978, the district court overruled these objections and ordered the appellant to testify in response to the subpoena. This decision was stayed by the Fifth Circuit.

During the pendency of the appeal in the Fifth Circuit, this Court decided *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Appellant then raised the facial constitutionality of §441b(a) under the First Amendment as an additional ground for denying enforcement of the FEC subpoena.

In its initial opinion, the panel of the Court of \ppeals "conclud[ed] that there exists a serious question whether the Federal Corrupt Practices Act is constitutional. If the FCPA is unconstitutional, then the subpoena issued in aid of an investigation intended to enforce the Act, must be invalid as well. This panel does not have jurisdiction to resolve the constitutional issue, however, [because] Section 437h of the Federal Election Campaign Act of 1971 as amended . . . requires that the question be presented to the *en banc* court." *FEC v. Lance*, 617 F.2d at 367. The panel referred the First Amendment issues, and later all issues, to the full court sitting *en banc*.

In an opinion dated January 15, 1981, the *en banc* Court of Appeals affirmed the district court and ordered the subpoena against Mr. Lance enforced without,

however, deciding whether §441b(a), under which the investigation was being conducted, was constitutional. The court gave two reasons for its refusal to decide whether the Act under which Mr. Lance was being investigated was facially unconstitutional under the First Amendment: (1) that Mr. Lance lacked standing to attack the facial constitutionality of the Act; (2) that it would unduly delay subpoena enforcement proceedings if a witness could challenge the constitutionality of a statute under which the investigation was being conducted. Slip Op. at 13-15.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The constitutionality under the First Amendment of §441b(a)'s sweeping prohibitions of all "contributions and expenditures" by national banks in connection with all elections for public office is one of major public importance that has never been ruled upon by this Court, although there is every reason to believe that the Act is unconstitutional under several recent decisions of this Court.

1.

The Importance of the Issue

Section 441b(a) is a recodification of the Federal Corrupt Practices Act (formerly 18 U.S.C. §610). For almost three quarters of a century since the enactment of

the Tillman Act of 1907, national banks have been prohibited from making political "contributions" in any amount to candidates for any political office from the town council to President of the United States; for more than fifty years, national banks have been absolutely prohibited from making any "expenditures" of bank funds "in connection with any elections for any political office." Similar limitations are imposed by the same statutes on "political contributions or expenditures" in federal elections by corporations and unions.

This Court has recognized that the rights to contribute money to a candidate for public office, and to spend one's own funds on newspaper ads or television commercials to advocate the election of a candidate for public office, are rights which are at the core of the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976). This Court has also held that business corporations possess the same First Amendment rights to advocate positions on public issues as the great newspapers or television networks (all of which transact business in the corporate form) or individuals. *Consolidated Edison Co. v Public Service Commission*, 100 S.Ct. 2326 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 100 S.Ct. 2343 (1980); *First National Bank of Boston v. Bellotti, supra*. Section 441b(a) flies in the face of these rights by its absolute denial to national banks of the right to exercise First Amendment rights in connection with all elections for public office, and corporations and unions in federal elections.

More important than the impact of §441b(a) on the rights of national banks, corporations and unions is its impact on voters, and the electoral process. Decisions of this Court have emphasized that the transcendent importance of the First Amendment does not lie in its protection of the right of the individual to speak freely and to advocate his own point of view. Rather, this Court has emphasized that the *right of the electorate to hear all points of view* is a principal objective of the First Amendment and is of greater importance in the functioning of the democratic process. *First National Bank of Boston v. Bellotti*, 435 U.S. at 777; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 754 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Section 441b(a) infringes the First Amendment rights of every registered voter in the United States by depriving them of the opportunity to hear the points of view of the national banks (and corporations and unions) regarding the most important decisions a voter is called on to make — whom should he elect to govern his local schools, or enforce his local laws, or to judge his disputes with his neighbors.

Although this case arises from events that are long past, the principle at issue — validity under the First Amendment of §441b(a) — is one of major public importance which will affect not only Mr. Lance, but also the rights of each of the 4,654 national banks, every corporation and union, and every citizen who is eli-

gible to vote in every election for every office in every county and town in the United States.

2.

The Constitutionality of §441b(a) Has Never Been Ruled Upon by this Court

National banks have been prohibited from making political "contributions" since 1907, and from making "expenditures in connection with any election to any political office" since 1925. Corporations have been subjected to similar limitations with respect to federal elections for like periods of time. Unions have been subjected to these restrictions since the enactment of the Taft-Hartley Act in 1947. Despite the sweep of these prohibitions, this Court has never ruled on the constitutionality of these prohibitions. In *United States v. CIO*, 335 U.S. 106, 129 (1948), however, four Justices of the Court (Mr. Justice Rutledge, joined by Justices Black, Douglas and Murphy) would have declared the Federal Corrupt Practices Act unconstitutional under the First Amendment. The statute was saved only because a bare majority of five Justices elected to reverse the CIO's conviction on other grounds. *See also United States v. United Auto Workers*, 352 U.S. 567, 593 (1957) (dissenting opinion of Mr. Justice Douglas, with whom Chief Justice Warren and Mr. Justice Black joined).

Four recent decisions of this Court leave no doubt that the Act's sweeping prohibitions against the use of

any bank funds to make "contributions" directly to candidates for any elective public offices or "expenditures in connection with" such elections, are overly broad and violate the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976), held unconstitutional the $1,000 ceiling imposed by the FECA upon the amount an individual can spend to promote the election of a candidate for federal office.[2] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), held unconstitutional a Massachusetts statute that was more narrowly drawn than §441b(a), which prohibited banks and business corporations from making "any contributions or expenditures" to influence the outcome of a referendum election, except where the referendum had a "material effect" on the business, property or assets of the corporation. *Consolidated Edison Co. v. Public Service Commission*, 100 S.Ct. 2326 (1980), and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 100 S.Ct. 2343 (1980), struck down state regulations limiting the exercise of First Amendment rights by regulated public utility corporations.

In his dissent in *Bellotti*, Mr. Justice White noted that "the analytical framework employed by the Court clearly raises doubt about the Corrupt Practices Act. If the corporate identity of the speaker makes no difference [as the Court held in *Bellotti* and reaffirmed in *Consolidated Edison* and *Central Hudson*] all the Court has done

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2 *See also Common Cause v. Schmitt*, 2 Federal Election Campaign Financing Guide (CCH) ¶ 9138 (D.D.C. September 30, 1980), *prob. juris. noted*, 49 U.S.L.W. 3616 (U.S. Feb. 23, 1981).

is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day." 435 U.S. at 820-21.

That day has finally come.

3.

Section 441b(a) is Facially Invalid Under the First Amendment

Decisions of this Court leave no doubt that §441b(a) is facially unconstitutional under the First Amendment on at least six grounds.

First, the Act singles out for suppression political contributions and expenditures by national banks, corporations and unions. The object of the Taft-Hartley amendment "was to force unions [as the Corrupt Practices Act had previously forced national banks and corporations] entirely out of political life and activity, including . . . the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where expression would become effective." *United States v. CIO,* 335 U.S. at 150. This Court has repeatedly held that statutes that discriminate between sources that are permitted to exercise First Amendment rights are invalid. *Consolidated Edison Co. v. Public Service Commission,* 100 S.Ct. 2326 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 100 S.Ct. 2343 (1980); *First National Bank of Boston v. Bel-*

lotti, 435 U.S. 765, 784-86 (1978); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Healy v. James*, 408 U.S. 169 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Second, the Act prohibits a national bank from making independent "expenditures" to advocate the election of a specific candidate for public office. For example, it is a violation of the statute for a national bank to spend 1¢ for an ad in a local newspaper to endorse a candidate for a town council. *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976), held the $1,000 ceiling on political "expenditures" imposed by the Federal Election Campaign Act (of which §441b(a) is now a part) invalid under the First Amendment. *See also Common Cause v. Schmitt*, 2 Federal Election Campaign Financing Guide (CCH) ¶ 9138 (D.D.C. September 30, 1980), *prob. juris. noted*, 49 U.S.L.W. 3616 (U.S. Feb. 23, 1981). The Court condemned the $1,000 ceiling on expenditures as a "most drastic . . . limitation . . . a primary effect of [which] . . . is to restrict the quantity of campaign speech . . . [and] limit political expression 'at the core of our electoral process and First Amendment freedoms.'" 424 U.S. at 39. Section 441b(a)'s absolute prohibition on political expenditures is far more drastic than the provisions of the FECA that were struck down by the Court in *Buckley v. Valeo* and is invalid for the same reasons.

Third, the Act prohibits national banks, corporations and unions from making "contributions" of even 1¢ to a candidate for public office. *See United States v. CIO*, 335

U.S. at 146 ("As was said in the course of the Senate debates, the interdiction applies to 'a dollar, or 50 cents, or $500 or $1,000.' "). In contrast, the Federal Election Campaign Act not only permits, but *encourages* individuals and organizations, other than national banks, corporations and unions, to give up to $1,000 directly to candidates for federal office. Section 441b(a), therefore, discriminates in the exercise of First Amendment rights based on the *source* of the political contributions, not their amount, and is invalid under the cases cited in the first paragraph above.

Fourth, other provisions of the FECA (*i.e.*, 2 U.S.C. §431(f)(4)(A)) exempt news stories and editorials by media corporations from the provisions of §441b(a). Thus, the *New York Times*, for example, is permitted to make an "expenditure" of corporate funds to endorse Ronald Reagan as a candidate for President without violating §441b(a), while it would be a violation of §441b(a) for the Chase Manhattan Bank to pay for an ad in the *Times* endorsing Mr. Reagan's candidacy. This distinction between those corporations of whom government approves as sources of political information and those of whom the government disapproves and, therefore, prohibits from endorsing candidates, violates the Fifth Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. at 784-86; and see the concurring opinion of Chief Justice Burger, 435 U.S. at 795-802.

Fifth, the language of §441b(a) that prohibits contributions or expenditures "in connection with" any

election to political office is unconstitutionally vague. Stricter standards apply when judging the vagueness of a statute under the First Amendment than in other cases. *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 620 (1976). Vagueness was one of the grounds on which Mr. Justice Rutledge would have declared the Act invalid in *United States v. CIO*, 335 U.S. at 150-53. In *Buckley v. Valeo*, 424 U.S. at 43-44, this Court was able to sustain the validity of §608(e)(1) of the FECA's prohibition against expenditures "in relation to" candidates for federal office (then codified at 18 U.S.C. §608(e)(1)), only because it was able to read into the statute clarifying limitations of §608(e)(2). No such clarifying statute is available in the case of §441b(a). Furthermore, the vagueness of determining when a referendum had a "material effect" on the business, property or assets of a bank or other corporation was one of the many grounds assigned by Mr. Justice Powell in invalidating the Massachusetts statute in *Bellotti*, 435 U.S. at 785 n. 21.

Sixth, the Act's absolute prohibition of "contributions" in any amount by a national bank to any candidate is invalid under the overbreadth doctrine. Although *Buckley v. Valeo* upheld the FECA's $1,000 ceiling on "contributions" to candidates for federal office (then codified at 18 U.S.C. §608(b)), the Court did so only after emphasizing that the ceiling was only a "marginal restriction," not a "direct restraint on his political communication, for it permits the symbolic ex-

pression of support evidenced by a contribution." The Court upheld the $1,000 limitation, stating:

> "The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. . . ."
>
> 424 U.S. at 28-29.

Section 441b(a) is broader than §608(b) in that it prohibits national banks from making even small political contributions that have no capacity "to secure a political *quid pro quo* from current and potential office holders." 424 U.S. at 26-27. Section 441b(a) prohibits *all* "contributions" by national banks, corporations and unions to candidates *regardless of the amount.* A gift of an 18¢ stamp by a national bank to assist a candidate in mailing a piece of campaign literature is a criminal violation of §441b(a). In the *CIO* case, Mr. Justice Rutledge emphasized the overbreadth of the absolute prohibition of contributions as one of the many grounds on which the statute violated the First Amendment.

> "[T]*he restriction in practical effect is prohibition, not regulation,* when it is considered with respect to

the objects of suppressing corruption and 'undue influence.' It is not a limitation, it is a prohibition upon expenditure of union funds in connection with a federal election. Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective. *As was said in the course of the Senate debates, the interdiction applies to 'a dollar, or 50 cents, or $500 or $1,000.'* 93 Cong Rec 6438. There is no showing, legislative or otherwise, of corruption so widespread or of 'undue influence' so dominating as could possibly justify so absolute a denial of these basic rights. *The statute, whether in terms or as given meaning by the legislative history, is not narrowly drawn to meet the precise evils of corruption or 'undue influence,'* if these were the controlling objects of the legislation. . . ."

335 U.S. at 146 (emphasis supplied).

Mr. Justice Rutledge condemned the blanket prohibition of political contributions as "a bludgeon, ill designed for curbing the evils said to justify its enactment." 335 U.S. at 153. The breadth of the statute demonstrates that the Congress was "more concerned with silencing corporations" in elections than preventing corruption of elected officials or protecting minority shareholders. *First National Bank of Boston v. Bellotti*, 435 U.S. at 793. *See also United States v. United Auto Workers*, 352 U.S. at 596, 598 (Mr. Justice Douglas dissenting) (The

Act is "a broadside assault on freedom of expression" and "is, indeed, burning down a house to roast a pig.").

For all of these reasons, there is little doubt that §441b(a) is facially unconstitutional under the First Amendment and should be, in Mr. Justice White's own words, "formally interred."

4.

Mr. Lance Has Standing to Challenge the Facial Constitutionality of §441b(a) Which is the Basis for the FEC's Jurisdiction to Investigate His 1974 Campaign

The Court of Appeals was clearly in error in its holding that Mr. Lance was without standing to challenge the constitutionality of §441b(a) under the First Amendment.

The FEC petition for enforcement states that the FEC had reason to believe that the Calhoun First National Bank (of which Mr. Lance was the president in 1974) violated 2 U.S.C. §441b "in connection with" Mr. Lance's 1974 campaign. The Reports of the investigations of the same subject conducted by the Comptroller of the Currency in 1975 and 1977 were filed of record on behalf of Mr. Lance and reflect that the Calhoun First National Bank allowed overdrafts in the checking accounts of the Lance for Governor campaign, and advanced money to pay certain campaign ex-

penses.[3] All of these amounts were repaid in full by Mr. Lance by December 16, 1974 (R. 61), before the creation of the FEC in 1975 and the enactment of §441b(a) in 1976. Thus, the essence of the FEC's investigation is that these advances and overdrafts to the Lance campaign by a national bank were "expenditures in connection with an election" and thus violated §441b(a). Mr. Lance plainly would have standing to challenge the constitutionality of §441b(a) even if this were not a First Amendment case. *See Watkins v. United States*, 354 U.S. 178, 187-88, 198 (1957) ("[A]n investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the power conferred upon the Congress in the Constitution").

Because this is a First Amendment case, technical rules of standing that apply in other cases do not apply here. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977). Under the overbreadth doctrine as consistently applied by this Court, a statute that is overbroad and improperly impinges on First Amendment rights in some, but not all, of its applications, will be declared invalid on its face, at the instance of one whose particular conduct might have been lawfully prohibited under a more precisely and narrowly-drawn statute. *Bates v. State Bar of Arizona, supra; Lewis v. City of New*

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3 See footnote 1, *supra*. The lower court refused to recognize that the FEC was attempting to subpoena information already in its possession contrary to the rule in *Donaldson v. United States*, 400 U.S. 517, 526-27 (1971); *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971).

Orleans, 415 U.S. 130, 133-34 (1974); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972).

The majority of the Court of Appeals refused to rule on appellant's First Amendment challenge to the constitutionality of the provisions of §441b(a). The lower court read out of context an *exception* to the definition of "contribution or expenditure" contained in 2 U.S.C. §441b(b)(2) for loans made by national banks to candidates in the ordinary course of business, as if that were the only part of the statute being applied to Mr. Lance. Based on this distorted reading of the statute, the lower court interpreted the primary thrust of the Act as a bank regulatory statute prohibiting unsafe and unsound banking practices, and not as a blanket prohibition of "contribution[s] or expenditure[s] in connection with any election to any public office," which is conduct that is plainly within the zone of protection of the First Amendment. *Buckley v. Valeo, supra; First National Bank of Boston v. Bellotti, supra.* The lower court said "the only part of the Act with which this investigation is concerned at this time is the prohibition against bank loans made out of the ordinary course of business." Slip Op. at 3365. Based on this distorted view of the statute, the lower court concluded that Mr. Lance lacked standing to challenge the validity of the blanket prohibition on contributions and expenditures for political campaigns by national banks. It said "[even if] Lance is correct that these other prohibitions may be unconstitutional, we do not see how this helps Lance, since our invalidation of them would still leave the particular

prohibition applicable to Lance standing and enforceable." Slip Op. at 3386.

The Court of Appeals' distorted reading of the statute blinded the court to the true purpose of the statute — *suppression* of political activity by national banks. *First National Bank of Boston v. Bellotti*, 435 U.S. at 793; *United States v. CIO*, 335 U.S. at 150. By its express terms, the statute is not aimed at preventing loans out of the ordinary course of business by national banks; rather, the statute forbids "contribution[s] or expenditure[s] in connection with any election to any public office," and it is only by virtue of this blanket prohibition that Mr. Lance has been subjected to proceedings under the statute. If the prohibitory provisions of the Act are unconstitutional and cannot be enforced, the exceptions to the definition in §441b(b)(2) for loans to candidates made in the ordinary course of business cannot save the statute.

The Court of Appeals held that the overbreadth doctrine which exists in First Amendment cases "is simply not apposite in the context of a subpoena enforcement proceeding." This conclusion was based on the theory that 2 U.S.C. §437h created an expedited procedure for determining constitutional questions under the Federal Election Campaign Act, and, therefore, it is reasonable to suppose "that even if §441b were overbroad it would not have a chilling effect substantial enough to justify invoking the overbreadth exception . . . since no

one need risk criminal or civil penalties to test the statute's constitutionality." Slip Op. at 3386.

This reasoning is fallacious. *First*, combined with the lower court's interpretation of the Act as retroactively applicable to bank overdrafts occurring in the course of a campaign in 1974, the reasoning of the lower court that the existence of §437h prevents Mr. Lance from invoking the overbreadth doctrine has trapped Mr. Lance in a Catch-22. At the time the overdrafts occurred, §437h had not been enacted. Obviously Mr. Lance had no opportunity to invoke the procedures of a non-existent statute before allowing his political campaign to overdraw its bank accounts.

Second, §437h is simply a more expedited version of the Federal Declaratory Judgment Act, 28 U.S.C. §2201. Although the declaratory judgment procedure has been available to First Amendment litigants since 1934, this fact has never been previously held to have prevented litigants from invoking the overbreadth doctrine in First Amendment cases. *Third*, the fact that none of the more than 4,500 national banks has yet brought a proceeding under §437h to have §441b(a) declared unconstitutional under the First Amendment is persuasive evidence that §437h does not operate as an effective mechanism to mitigate the Act's obvious "chilling effect."

The final reason for the Court of Appeals' refusal to decide the First Amendment issue was that the scope of

issues that may be litigated in subpoena enforcement proceedings is "narrow" and "that allowing an overbreadth attack against the entire statute here would be at odds with our understanding of the appropriate role of the Court in determining whether a subpoena should be enforced." Slip Op. at 3386. The reasoning of the lower court conflicts with decisions of this Court. In *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), this Court held with respect to judicial enforcement of an agency subpoena that "the inquiry [must be] within the [*lawful*] *authority of the agency.*" (Emphasis supplied) *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (The inquiry must be for a *"lawful purpose"* (emphasis supplied)); *Watkins v. United States, supra.* The Fifth Circuit's ruling also conflicts with the decisions of this Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), in which the Court ruled upon the constitutionality of the Fair Labor Standards Act in a subpoena enforcement proceeding, and *Reisman v. Caplin*, 375 U.S. 440 (1964), in which this Court emphasized that when a proceeding to enforce an administrative subpoena is filed, "the witness may challenge the subpoena on *any appropriate ground.*" 375 U.S. at 449 (emphasis supplied).

5.

Section 441b(a) Should Not Have Been Applied Retroactively by the Lower Court to Validate the FEC Subpoena

The First Amendment issue need not be reached unless §441b(a) is applied retroactively to sustain the

FEC's power to investigate appellant's 1974 campaign. If probable jurisdiction is noted, appellant will argue that the decision below which gave §441b(a) a retroactive interpretation violates " 'the first rule of construction . . . that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature." ' " *Greene v. United States*, 376 U.S. 149, 160 (1964) (quoting *Union Pacific Railroad v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). Not only did the lower court *not* find "unequivocal and inflexible" evidence that Congress intended that the FECA be applied retroactively, it ignored three provisions that provide unmistakable evidence of an *opposite* intent on the part of Congress: (1) the 1974 amendments were enacted on October 15, 1974, but Congress delayed the effective date of the amendments until January 1, 1975 to avoid changing the rules in the middle of the 1974 elections; (2) only one provision of the 1974 amendments was expressly made applicable to pending cases — the shortened three-year statute of limitations of 2 U.S.C. §455; (3) when Congress enacted 2 U.S.C. §441b(a) on May 11, 1976, Congress did not repeal 18 U.S.C. §610 in its entirety, but preserved the existence of §610 for purposes of prosecuting suspected violations (such as those for which Mr. Lance is being investigated) occurring prior to May 11, 1976. Pub. L. No. 94-283, §114, 90 Stat. 495 (1976).

CONCLUSION

For the reasons outlined above, appellant respectfully urges that the Court note probable jurisdiction of his appeal, or, in the alternative, grant a writ of certiorari to review the decision of the lower court, and, after briefing and oral argument of the merits, to reverse that decision.

Respectfully submitted,

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APPENDICES

APPENDIX A

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellee,

versus

T. Bertram LANCE,
Defendant-Appellant.

No. 78-1859.

United States Court of Appeals,
Fifth Circuit.

May 5, 1980.

Appeal from the United States District Court for the Northern District of Georgia.

Before COLEMAN, Chief Judge, and BROWN and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

This case concerns the validity of an administrative subpoena, issued by the Federal Election Commission

(FEC or Commission), requiring T. Bertram Lance to appear for a deposition and to produce certain documents. The subpoena is incident to an enforcement investigation of possible illegal contributions by two national banks to the Bert Lance for Governor Campaign of 1974. The Commission began the investigation after determining, pursuant to 2 U.S.C. §437g(a)(2) (1976), that there was "reason to believe" the banks and the Bert Lance Campaign Committee had violated the Federal Corrupt Practices Act, 2 U.S.C. §441b (1976) (FCPA).[1] Upon Lance's failure to

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1 The sections of 441b pertinent to this case provide:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a *contribution or expenditure* in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) . . .

(2) For purposes of this section and 791(h) of Title 15, the term 'contribution or expenditure' shall include

appear for the deposition, the Commission petitioned the district court for the Northern District of Georgia to enforce the subpoena. After a hearing, the district court ordered Lance to comply with the subpoena. Lance now appeals from that order.

Although we hold that the district court correctly rejected the arguments that Lance raised in the enforcement proceedings, we decline to order enforcement of

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> any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(Emphasis added.)

From 1925 until 1976, the proscriptions now set out in section 441b were codified as section 610 of the Federal Corrupt Practices Act of 1925, 18 U.S.C. §610 (1970) (repealed 1976). Although it is now a part of the Federal Election Campaign Act, 2 U.S.C. §§431-455 (1976), section 441(b) continues to be known as the Federal Corrupt Practices Act. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 n.26, 98 S.Ct. 1407, 1422, 55 L.Ed.2d 707 (1978).

the subpoena because we conclude that there exists a serious question whether the Federal Corrupt Practices Act is constitutional. If the FCPA is unconstitutional, then the subpoena, issued in aid of an investigation intended to enforce the Act, must be invalid as well. This panel does not have jurisdiction to resolve the constitutional issue, however. Section 437h of the Federal Election Campaign Act of 1971, as amended (FECA), 2 U.S.C. §§431-455 (1976), requires that the question be presented to the en banc court. The enforcement order is stayed pending the en banc decision.

I

Lance ran for Governor of Georgia in 1974. The campaign ended on August 12, 1974, when Lance lost in the Democratic primary election. In September and November 1977, the Federal Election Commission, acting on the basis of information it had acquired in the ordinary course of carrying out its supervisory responsibilities over the Federal Election Campaign Act, found reason to believe that the 1974 Bert Lance for Governor Campaign Committee, the Calhoun First National Bank (Calhoun Bank), and the National City Bank of Rome, Georgia (National City Bank), had violated section 441b. The possible violations relate to extensions of credit by the two banks to the campaign committee before, during, and after Lance's campaign. The Commission contends that the suspect extensions of credit include "overdrafts in 1974, repaid in

1975, loans made during the 1974 campaign, other extensions of credit made during 1974 and repaid in 1975, and loans made between 1975 and 1977 for the purpose of repaying outstanding campaign debts." Brief for the Commission, at 3.

On November 10, 1977, the Commission subpoenaed Lance, requiring him to produce documents and to appear for a deposition on December 2, 1977. Lance moved the Commission on November 22, 1977, to quash the subpoena, and the Commission denied the motion to quash on November 29, 1977. When Lance failed to appear for the scheduled deposition, the Commission petitioned the district court to enforce the subpoena.

The district court held a hearing on January 16, 1978, and considered briefs and affidavits filed by the parties. Lance raised the following arguments in the district court: (1) since section 441b is a criminal statute, the FEC's attempt to apply the statute to justify an investigation of events that occurred prior to its enactment violates the ex post facto and due process clauses of the Constitution; (2) the statute of limitations bars the investigation; (3) the FEC has no jurisdiction to investigate violations of section 610 (the predecessor of section 441b, *see* note 1 *supra*) that occurred prior to 1975; and (4) since the FEC already has all the information that it might acquire by the subpoena, enforcement should be denied on grounds of burden and harassment. On February 9, 1978, the district court granted

enforcement of the subpoena, reasoning that the subpoena was well within the Commission's "broad and inclusive" statutory authority to investigate violations of the FECA. Record at 82. Lance moved the court to reconsider its order, and that motion was denied on March 24, 1978.

In this appeal, Lance raises again the four arguments that he expounded in the proceedings below. In addition, he contends that the subpoena must be quashed since section 441b violates the first amendment.

II

The FEC derives its power to issue subpoenas from 2 U.S.C. §437d:

> (a) The Commission has the power—
>
> (3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties
>
> . . . .

One of the Commission's duties is to investigate alleged violations of the FECA when "[t]he Commission . . . has reason to believe that such a violation has occurred . . .." 2 U.S.C. §437g(a)(2). The Commission's subpoena of Lance is grounded upon its finding that there exists "reason to believe" that §441b has been

violated. The Commission may not enforce its own subpoena, but must petition for enforcement in the district court. 2 U.S.C. §437d(b).

The Supreme Court has clearly indicated that a court's role in a proceeding to enforce an administrative subpoena is a limited one. In *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943), the Court considered the validity of a subpoena issued by the Secretary of Labor incident to a proceeding under the Walsh-Healey Public Contracts Act. The Court held that the subpoena should be enforced since the evidence sought "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary . . .." *Id.* at 509, 63 S.Ct. at 343.

The Supreme Court again considered the legal principles governing the enforcement of an administrative subpoena in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). There, the Court considered a challenge to subpoenas issued by the Administrator of the Wage and Hour Division, Department of Labor, as part of an investigation under the Fair Labor Standards Act. The Court ordered enforcement, holding that "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 209, 66 S.Ct. at 505. In addition, the court pointed out that the requirement that the Administrator not act arbitrarily or outside of his statutory authority "does not mean that his inquiry must be 'limited . . . by . . . forecasts of

the probable result of the investigation. . . .' " *Id.* at 216, 66 S.Ct. at 509, quoting *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919).

United States v. Morton Salt Co., 338 U.S. 632, 652, 70 S.Ct. 357, 369, 94 L.Ed. 401 (1950), a case involving the investigatory power of the Federal Trade Commission, provided the Court with the opportunity to elaborate on the standard that it had applied in *Oklahoma Press:* "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." The Court emphasized that administrative investigations could not be equated with the more constrained operations of the judicial process:

> Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are dele-

> gated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642-43, 70 S.Ct. at 364. *See also, United States v. Bisceglia,* 420 U.S. 141, 147, 95 S.Ct. 915, 919, 43 L.Ed.2d 88 (1975).

The significance of the distinction between administrative investigations and judicial fact-finding has also been recognized by this court:

> [T]here are grave policy considerations that militate against allowing the process of administrative investigation to become adversary in nature, even after it becomes specific and particularized. These considerations were succinctly stated by the Supreme Court in *Hannah v. Larche,* 363 U.S. 420, 443-44, 80 S.Ct. 1502, [1515, 4 L.Ed.2d 1307], where it stated:
>
> > . . . [T]he investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings . . .. Fact-finding agencies . . . would be plagued by the injection of collateral issues that would make the investigation interminable * * * This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

Genuine Parts Co. v. Federal Trade Commission, 445 F.2d 1382, 1388 (5th Cir. 1971). In *Genuine Parts* the Genuine Parts Company challenged an order, issued by the Federal Trade Commission, requiring the company to file certain information. The court held that the company had to submit the requested information since the administrative order was not oppressive or unreasonably burdensome, and, since it was for an authorized purpose, was sufficiently definite, and was reasonably relevant to the purpose of the investigation. *Id.* at 1391.

The legal standards and policy considerations set out in these cases provide the framework for our analysis of Lance's objections to the Federal Election Commission's subpoena.

A.

Lance's first objection is based on the ex post facto and due process clauses of the Constitution. He points out that the Commission's petition for enforcement expressly states that the subpoena was issued incident to an investigation of suspected violations of section 441b by the 1974 Bert Lance for Governor Campaign Committee, the Calhoun Bank, and the National City Bank. Section 441b was not enacted until May 1976, however. It is clear, Lance argues, that the suspected violations could not have occurred after the date of the enactment and that the ex post facto and due process clauses bar a prosecution founded on any earlier transactions. Since the investigation could not result in the

issuance of a complaint, the subpoena does not meet the *Oklahoma Press* requirement of a *lawfully* authorized purpose. Brief of T. Bertram Lance at 25.

There are several reasons why we cannot agree with Lance. A statute does not run afoul of the ex post facto clause unless it" 'makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or . . . 'aggravates a *crime*, or makes it *greater* than it was when committed.' " *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964), quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). The first problem with Lance's argument is that the proscription the campaign committee and the banks are suspected of violating has been in effect since 1907, when Congress passed the Tillman Act. 34 Stat. 864. The Tillman Act's prohibition of political contributions by national banks was re-enacted as the Federal Corrupt Practices Act in 1925, 43 Stat. 1070 (later codified at 18 U.S.C. §610 (1970) (repealed 1976)), and was recodified as section 441b in 1976. The 1976 amendment that effected the recodification provides that, except as otherwise stated, any "section or penalty [of section 610] shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture or liability." Pub.L. No. 94-283, 90 Stat. 475, 495 (appearing at note to 2 U.S.C. §441 (1976)). Since section 441b contains the same proscription as section 610, it follows that any action falling within the terms of section 441b

could not have been "innocent when done" if the act was committed while section 610 was in force. The 1976 amendment indicates that Congress intended the recodification of section 610 to absolve no one from being charged with violating that provision.

The second weakness in Lance's argument is that it rests on the notion that 2 U.S.C. §437g, which sets out remedies for violations of the FECA, is a *criminal* statute that *aggravates* a crime or increases the penalties. Section 437g authorizes a broad range of remedies for violations of 441b. For example, the Commission may seek an informal conciliation agreement, or it may bring an action for an injunction or a fine not greater than five thousand dollars or an amount equal to the contribution or expenditure involved in the violation.[2] The statute explicitly states that the cause of action and the possible penalties are "civil." Lance argues that the remedies available to the Commission must, nevertheless, be regarded as "criminal in nature." He further contends that section 437g has impermissibly "increased the penalties" for a section 441b violation since some of the sanctions might impose a greater monetary loss on a violator than the criminal penalties of the predecessor statute, section 610.[3]

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2 If the violation was willful, the violator is subject to a civil penalty not greater than $10,000 or 200% of the unlawful contribution.

3 Violations of 18 U.S.C. §610 by individuals were punishable by a fine of not more than $1,000 or imprisonment of not more than one year, or both; if the violation was willful, the maximum fine was $10,000 and the maximum imprisonment was five years.

In *Federal Election Commission v. Weinsten*, 462 F.Supp. 243 (S.D.N.Y. 1978), the court rejected the argument that the penalties set out in section 437g are really "quasi-criminal," holding that "Congress' language is dispositive and the penalties imposed by FEC are . . . civil in nature." *Id.* at 252. Lance has not presented any reasoning or cited any authority that persuades us to disagree with the *Weinsten* court.

Even if we could accept the idea that some of the section 437g remedies are criminal in nature, Lance's argument would fail because we cannot assume that the Commission would, in a future proceeding against any of the subjects of the investigation, request the maximum penalty permitted by the statute. If the Commission were to seek no greater penalty than a fine in an amount permitted by section 610, the Commission's action could not conceivably violate the ex post facto or due process clauses. *See, Smith v. Johnson*, 458 F.Supp. 289, 292 (E.D. La. 1977) ("[I]t is not a violation of the *ex post facto* provision for the individual to be sentenced to a penalty less harsh than the one that it appeared he would be subjected to, and was given notice of, at the moment of the crime.").

A further reason for our rejection of Lance's argument is that it assumes, as we may not, that any future FEC proceeding against the subjects of the investigation would *necessarily* depend solely on transactions that occurred before the enactment of section 441b. Lance argues that the record is clear that no unlawful con-

tributions, in the form of overdrafts or other payments, could have been made later than January 15, 1975. The "record" to which Lance refers consists of briefs, affidavits, and other documents that Lance has submitted to the court. As the FEC correctly observes, he seeks to substitute his own unsworn assertion that no violations could have occurred later than January 1975 for a judgment based on evidence assimilated through an FEC investigation. Neither the district court nor this court is "free to speculate about the possible charges that might be included in a future complaint, and then to determine the [validity] of the subpoena requests by reference to those hypothetical charges." *FTC v. Texaco*, 555 F.2d 862, 874 (D.C. Cir.)(en banc), *cert. denied sub nom. Standard Oil Co. of California v. FTC*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). *See also Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 276, 66 S.Ct. at 509.

B.

Lance next contends that the Commission's subpoena should not be enforced since any action that the Commission might bring in the future to remedy an alleged violation of section 441b would be barred by the statute of limitations. He cites no authority in direct support of the proposition that the FEC may not investigate a suspected violation after the period of limitations has run. Rather, he suggests that the running of the statute would prevent the issuance of a "complaint" and relies on *Harriman v. Interstate Commerce Com-*

mission, 211 U.S. 407, 29 S.Ct. 115, 53 L.Ed. 253 (1908), for his assertion that the FEC has no power to issue a subpoena that "cannot possibly concern 'matters that might [be] the object of [a] complaint.' " Brief of T. Bertram Lance at 35, quoting *Harriman* at 419, 29 S.Ct. at 118. Although we admit the continuing validity of the *Harriman* Court's statement, we think that Lance has too facilely assumed that the existence of a statute of limitations defense means that no complaint may issue. To the contrary, there is case law to the effect that "an indictment states an offense even though the crime alleged appears to be barred by limitation." *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84 (1965). We need not decide whether the running of the statute — or, if no statute of limitations is applicable, the mere passing of time — would *ever* deprive an administrative agency of its power to conduct an investigation because it is manifest that such a principle could not proscribe the FEC's investigation in this case.

The period of limitations on which Lance bases his argument is set out in 2 U.S.C. §455(a):

> No person shall be prosecuted, tried or punished for any violation of subchapter I of this chapter [including section 441b] unless the indictment is found or the information is instituted within 3 years after the date of the violation.

The statute refers to the institution of an "information" or an "indictment," but not to the pursuit of a civil remedy. Thus, the statutory language indicates that the period of limitations applies only to the criminal prosecutions for violations of the FECA authorized by 2 U.S.C. §441j. The legislative history of section 455 supports this literal reading of the statute. The Senate Conference Report, S.Rep.No. 93-1237, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin.News, pp. 5587, 5618, 5668-69, explains that the section 455 period of limitations applies to the bringing of a "*criminal* action" (emphasis added). As we noted above, section 437g explicitly states that the actions that the FEC may bring are *civil*. Congress did not provide for a statute of limitations that would be applicable to civil enforcement actions brought by the FEC, and there is no general federal period of limitations for civil actions. Since state statutes of limitation are not applicable to suits by a federal agency to enforce rights of the sovereign, *see, e.g., Equal Employment Opportunity Commission v. Griffin Wheel Co.*, 511 F.2d 456 (5th Cir. 1975), there appears to be no time limit to the FEC's power to seek a section 437g remedy.

Even if the section 455 period of limitations were applicable, we would not be persuaded by Lance's argument. The argument demands that we assume that the Commission's investigation could not possibly uncover evidence that a violation has occurred within the period of limitations. As we stated above, however, a court may not hypothesize the fruits of an investiga-

tion in a proceeding to enforce an administrative subpoena. *See* pp. 370-371 *supra*.[4]

C.

Lance's third objection to the subpoena is that the Commission has no jurisdiction to conduct civil investigations concerning violations of the Federal Corrupt Practices Act occurring prior to 1975. Congress created the Federal Election Commission and gave the Commission its enforcement powers with the Federal Election Campaign Act Amendments of 1974, Pub.L. No. 93-443, 88 Stat. 1263 (Amendments) (amending the Federal Election Campaign Act of 1971, 86 Stat. 3). Section 410 of the Amendments set January 1, 1975, as the date on which the Amendments were to become effective. Lance does not dispute that the Amendments gave the Commission enforcement authority over section 610, the predecessor of section 441b; rather, he contends that the Commission's remedial powers are prospective only, such that the Commission has no jurisdiction to investigate violations of section 610 occur-

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4 Lance suggests that his argument does not depend on speculation about the evidence the Commission might obtain through its investigation. Rather, he asks us to hold, as a matter of law, that section 441b does not prohibit contributions made *after* an election. Since the election involved in the Commission's investigation took place in 1974, we would not have to engage in any speculation to conclude that no violation could have occurred after that date. We decline to accept Lance's reading of the statute, for it would permit candidates to evade the FECA's restrictions on the contributions and expenditures by running their campaigns at a deficit and then collecting contributions after the election.

ring before the effective date of the Amendments.

Lance relies on *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), as authority for his contention that the FEC has only prospective jurisdiction over section 610. In that case, the Supreme Court rejected the notion that a private cause of action is proper to remedy violations of section 610, holding that the Amendments gave the Commission primary and exclusive authority over such violations. *Id.* at 74-77, 95 S.Ct. 2086-87. The Amendments, the Court noted, "established an administrative procedure for processing complaints of alleged violations of §610 after January 1, 1975 . . .." *Id.* at 74-75, 95 S.Ct. at 2086. Lance's argument depends on the ambiguity of the reference of the phrase "after January 1, 1975." Lance's argument assumes that the phrase was intended to modify "violations." The Commission answers that the Court was saying merely that the "procedure for processing complaints" was to be effective "after January 1, 1975." We think that the Commission's interpretation of the Court's language is the only reasonable one. There is no doubt that section 410 of the 1974 Amendments states that January 1, 1975, is the effective date of the Amendments — including the provisions creating the Commission and giving it civil enforcement authority. In the context of the entire opinion, it is clear that the Court's intent was simply to convey this uncontroversial fact as part of some general background information about the Amendments. There was no reason

to consider whether the Commission's remedial powers were only prospectively applicable, and if the Court *had* chosen to address this issue, it surely would not have done so in such an off-hand manner.

In opposition to the *Cort v. Ash* language on which Lance relies, there is powerful evidence that Congress specifically intended the Commission's enforcement powers to be retroactively applicable. When Congress recodified in 1976 the substantive prohibitions of section 610 as section 441b, it enacted at the same time a savings clause providing that the repeal of section 610 and the penalties for its violation "shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such section or penalty, and such section or penalty shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability." P.L. 94-283, 90 Stat. 475, 495 (appearing at note to 2 U.S.C. §441 (1976)). Section 610 was, on its face, a criminal statute; however, the savings clause "sustains" not only criminal prosecutions for violations of section 610, but also "any proper action." The phrase "any proper action" apparently refers to the civil remedies that the Commission might pursue under section 437g. Thus, the savings clause evidences Congress's intent that the Commission have the authority to apply its own enforcement powers "retroactively" to remedy violations of section 610. As we observed in our discussion of Lance's ex post facto-due process argument, there is

no constitutional bar to applying newly enacted civil penalties — or lesser criminal penalties — to a pre-existing criminal prohibition. *See* p. 370 *supra*.

We need not conclusively resolve at this time the question whether the FEC's remedial powers are retroactively applicable, however. Even if it were settled that the Commission had no authority to investigate violations of section 610 that occurred before January 1, 1975, again it would be improper for us to speculate that the investigation could not uncover evidence that any violation occurred after that date. *See* pp. 370-371 *supra*.

D.

The fourth argument Lance raises against enforcement of the subpoena is that the subpoena is "unnecessarily burdensome and harassing" because "the information sought from Mr. Lance is already in the FEC's possession." Brief of T. Bertram Lance at 43. The Commission obtained all the relevant information about the 1974 gubernatorial campaign, Lance contends, "as a result of two prior investigations of the Comptroller of the Currency investigating appellant's testimony before the Senate Committee on Governmental Affairs." *Id.* We agree with Lance that "burden and harassment" may sometimes be a ground for a court to deny enforcement of an administrative subpoena, *see* p. 369 *supra*, and we suppose that it might be unduly burdensome for an agency to require someone

to produce the very evidence that the agency has previously acquired. In this case, however, we cannot assume, on the basis of Lance's assertions, that the documents requested by the subpoena are identical to those that the Commission has obtained from other sources; nor can we accept Lance's contention that the Commission already has the answers to deposition questions that it has not yet asked.

E.

Lance's final argument in opposition to the subpoena draws on the principle that courts will refuse to enforce a subpoena unless the investigation to which the subpoena is incident is "for a lawfully authorized purpose, within the power of Congress to command." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 209, 66 S.Ct. at 505. Lance contends, in effect, that section 441b (FCPA) is unconstitutional, and that it is not within the power of Congress to authorize the enforcement of an unconstitutional statute.

In arguing that the FCPA is unconstitutional, Lance relies most heavily on *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which was decided after Lance filed his appeal from the district court's enforcement order. In *Buckley v. Valeo*, the Supreme Court held unconstitutional the FECA's $1,000 per candidate ceiling on political "expenditures" in federal elections. Two years

later, in *First National Bank of Boston,* the Court held unconstitutional as violative of the first amendment a Massachusetts statute prohibiting "business corporation[s] incorporated under the laws of or doing business in the Commonwealth" from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters . . .." 435 U.S. at 768 n.2, 98 S.Ct. at 1412. Dissenting in *First National Bank of Boston,* Justice White warned that the combined effect of *Buckley v. Valeo* and *First National Bank of Boston* was simply "to reserve the formal interment of the Corrupt Practices Act . . . for another day." 435 U.S. at 821, 98 S.Ct. at 1439. Lance urges that Justice White was correct and that the day has arrived.

Since Lance did not raise the first amendment issue in the district court proceedings, our first inquiry is whether the issue may be raised on appeal. The general rule is that, "in the absence of a miscarriage of justice, issues not raised or presented in the lower court will not be considered for the first time on appeal." *Excavators and Erectors, Inc. v. Bullard Engineers, Inc.,* 489 F.2d 318, 320 (5th Cir. 1973). In *Higginbotham v. Ford Motor Co.,* 540 F.2d 762, 768 n.10 (5th Cir. 1976), we explained, "the rationale for the rule requires its application if additional facts would have been developed in the trial court had the new theory been presented there; in that case judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the

theories argued below." Here, however, as in *Higginbotham*, the "new theory raises a purely legal question. No facts could have been developed to aid our resolution of the issue." *Id.* Also as in *Higginbotham*, the parties have filed post-oral argument briefs discussing the issue at the request of the court. *See id.* In the circumstances of the case, we agree with the *Higginbotham* court that "it would be unjust . . . to refuse to consider the new argument." *Id. See also Milhouse v. Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976); *United States v. Jones*, 527 F.2d 817, 819 (D.C. Cir. 1975).

Nevertheless, there is an additional bar to this panel's considering Lance's first amendment argument. Section 437h(a) of the FECA provides: "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." Congress's obvious intent in enacting this section was to deprive district courts and panels of the circuit courts of appeals of jurisdiction to consider the constitutionality of the FECA. In our view, the outcome of the present appeal depends on the resolution of the question of the constitutionality of section 441b, which is, of course, part of the FECA. Therefore, we must submit this case to the en banc court for resolution of the first amendment issue.

SUBMITTED TO EN BANC COURT.

COLEMAN, Chief Judge, concurring specially.

I agree that the case should be submitted to the en banc court on the issue of constitutionality. That being so, I would hold that the case in its entirety should go there for the reason that subsidiary issues should not be decided pending a determination of constitutionality.

APPENDIX B

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellee,

versus

T. Bertram LANCE,
Defendant-Appellant.

No. 78-1859.

United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1981.

Appeal from the United States District Court for the Northern District of Georgia.

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

TJOFLAT, Circuit Judge:

The Federal Election Commission (FEC or Commission) brought this action to enforce an administrative subpoena requiring T. Bertram Lance to appear for a deposition and to produce certain documents. The subpoena is incident to an enforcement investigation of possibly illegal loans, some in the form of overdrafts, made by two national banks to the Bert Lance for Governor Campaign of 1974. The Commission began the investigation after determining, pursuant to 2 U.S.C. §437g(a)(2) (1976), that there was "reason to believe" the banks and the Bert Lance Campaign Committee had violated the Federal Corrupt Practices Act, 2 U.S.C. §441b (1976) (FCPA or Act).[1] Upon Lance's fail-

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* Judge Jerre S. Williams did not participate in the oral argument or the conference on this case and, therefore, does not participate in this decision.

1 The sections of 441b pertinent to this case provide:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a *contribution or expenditure* in connection with any election to any political office, or in connection with any

primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) . . .

(2) For the purposes of this section and section 791(h) of title 15, the term *"contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business)* to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) on partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

ure to appear for the deposition, the Commission petitioned the district court to enforce the subpoena. After a hearing, the district court ordered Lance to comply with the subpoena, and Lance appealed from that order.

A panel of this court held that the district court had correctly rejected the arguments that Lance had raised in the enforcement proceedings, but declined to order enforcement of the subpoena because it concluded that "there exists a serious question whether the Federal Corrupt Practices Act is constitutional." *Federal Election Commission v. Lance*, 617 F.2d 365, 367 (5th Cir. 1980). "If the FCPA is unconstitutional," the panel reasoned, "then the subpoena, issued in aid of an investigation intended to enforce the Act, must be invalid as well." *Id.* at 367. Nevertheless, the panel declined to resolve the constitutional issue, ruling that section 437h of the Federal Election Campaign Act of 1971, as amended (FECA), 2 U.S.C. §§431-455 (1976), requires that the question be decided by the en banc court. *Id.* at 374.

We conclude that the provisions of the Act that Lance has standing to challenge are not facially uncon-

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(Emphasis added.)

From 1925 until 1976, the proscriptions now set out in section 441b were codified as section 610 of the Federal Corrupt Practices Act of 1925, 18 U.S.C. §610 (1970) (repealed 1976). Although now a part of the Federal Election Campaign Act, 2 U.S.C. §§431-455 (1976), section 441b continues to be known as the Federal Corcupt Practices Act. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788, n.26, 98 S.Ct. 1407, 1422, n.26, 55 L.Ed.2d 707 (1978).

stitutional and that none of Lance's other objections to the subpoena have merit. Therefore, we affirm the district court's order enforcing the subpoena.

I

Lance ran for Governor of Georgia in 1974. The Bert Lance for Governor Campaign Committee had checking accounts with two banks, the Calhoun First National Bank (Calhoun Bank) and the National City Bank of Rome, Georgia (National City Bank). The campaign ended on August 12, 1974, when Lance lost in the Democratic primary election. In April, 1975, the Enforcement and Compliance Section of the Comptroller of the Currency of the United States began an investigation of the financial dealings between the campaign committee and the Calhoun Bank. In a report dated September 22, 1975, the Comptroller set out its findings that the Calhoun Bank had repeatedly permitted the campaign committee to overdraw its accounts to pay campaign expenses. The overdrafts were still being repaid, the report stated, as late as January 31, 1975, and the bank "was paid no interest for the use of its money . . . ." Record at 37. The report concluded that these transactions indicated possible violations of the Federal Corrupt Practices Act as well as of 18 U.S.C. §656 (1976) (a statute concerning misapplication of bank funds) and 18 U.S.C. §1005 (1976) (a statute prohibiting false bank record entries).

The Comptroller again scrutinized the financing of the 1974 Bert Lance for Governor Campaign in 1977 as a part of a comprehensive investigation of Lance's financial affairs. This second investigation concluded with a report, dated August 18, 1977, that further detailed the irregular extensions of credit by the Calhoun Bank to the campaign committee before, during, and after Lance's campaign.[2]

In September and November, 1977, the Federal Election Commission, acting on the basis of the reports issued by the Comptroller of the Currency, Record at 4, found reason to believe that the Bert Lance for Governor Campaign Committee, the Calhoun Bank, and the National City Bank had violated section 441b. The Commission asserts that the suspected violations relate to the two banks' extensions of credit to the campaign committee, including "overdrafts in 1974, repaid in 1975, loans made during the 1974 campaign, other extensions of credit made during 1974, and repaid in 1975, and loans made between 1975 and 1977 for the purpose of repaying outstanding campaign debts." Brief for the Commission, at 3.

After making the requisite finding of "reason to believe" that the Act had been violated, *see* §437g(a)(2),

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2 As Lance admits, Brief for T. Bertram Lance at 7, the campaign committee also overdrew its accounts with the National City Bank of Rome. The record does not, however, reveal whether the transactions with the National City Bank were also investigated by the Comptroller of the Currency.

the Commission began an enforcement investigation. On November 10, 1977, the Commission subpoenaed Lance, requiring him to produce documents and to appear for a deposition on December 2, 1977. Lance moved the Commission on November 22, 1977, to quash the subpoena; the Commission denied the motion on November 29, 1977. When Lance failed to appear for the scheduled deposition, the Commission petitioned the district court to enforce the subpoena.

The district court held a hearing on January 16, 1978, at which it considered briefs and affidavits filed by the parties. Lance raised the following arguments in the district court: (1) since section 441b is a criminal statute, the FEC's attempt to apply the statute to justify an investigation of events that occurred prior to its enactment violates the ex post facto and due process clauses of the Constitution; (2) the statute of limitations bars the investigation; (3) the FEC has no jurisdiction to investigate violations of section 610 (the predecessor of section 441b, *see* note 1 *supra*) that occurred prior to 1975; and (4) since the FEC already has all the information it might acquire by the subpoena, enforcement should be denied on grounds of burden and harassment. On February 9, 1978, the district court granted enforcement of the subpoena, reasoning that the subpoena was well within the Commission's "broad and inclusive" statutory authority to investigate violations of the FECA. Record at 82. Lance moved the court to reconsider its order, and that motion was denied on March 24, 1978.

On appeal, Lance raised again the four arguments that he had advanced in the district court. In addition, he argued that the subpoena should be quashed on the ground that section 441b was facially violative of the first amendment. After rejecting Lance's first four arguments, the panel determined that he could challenge the facial constitutionality of the Act on appeal even though he had not raised the issue in the district court proceedings:

> The general rule is that, "in the absence of a miscarriage of justice, issues not raised or presented in the lower court will not be considered for the first time on appeal." *Excavators and Erectors, Inc. v. Bullard Engineers, Inc.*, 489 F.2d 318, 320 (5th Cir. 1973). In *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976), we explained, "the rationale for the rule requires its application if additional facts would have been developed in the trial court had the new theory been presented there; in that case judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below." Here, however, as in *Higginbotham*, the "new theory raises a purely legal question. No facts could have been developed to aid our resolution of the issue." *Id.* Also as in *Higginbotham*, the parties have filed post-oral argument briefs discussing the issue at the request of the court. *See id.* In the circumstances

> of the case, we agree with the *Higginbotham* court that "it would be unjust . . . to refuse to consider the new argument." *Id. See also Milhouse v. Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976); *United States v. Jones*, 527 F.2d 817, 819 (D.C. Cir. 1975).

Federal Election Commission v. Lance, 617 F.2d 365, 374 (5th Cir. 1980).

The panel went on to hold, however, that it lacked jurisdiction to resolve the constitutional question:

> Nevertheless, there is an additional bar to this panel's considering Lance's first amendment argument. Section 437h(a) of the FECA provides: "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." Congress's obvious intent in enacting this section was to deprive district courts and panels of the circuit courts of appeals of jurisdiction to consider the constitutionality of the FECA. In our view, the outcome of the present appeal depends on the resolution of the question of the constitutionality of section 441b, which is, of course, part of the FECA. Therefore, we must submit this case to the en banc court for resolution of the first amendment issue.

Id. at 374.

II

Section 437h(a), the statutory provision under which the panel presented this case to the en banc court, is an extraordinary piece of legislation. Subsection (a) provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

As the Ninth Circuit, sitting en banc, recently observed, "[v]arious difficult questions can be raised about the meaning and constitutionality," *California Medical Association v. Federal Election Commission*, ____ F.2d ____, ____, No. 79-4426, slip op. at 3371, 3385 (9th Cir. May 23, 1980) (en banc), of the section's requirement that "all questions of constitutionality of this Act" be heard by "the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." 2 U.S.C. §437h(a) (1976). One of these ques-

tions, as the Ninth Circuit put it, is "the extent to which the breadth of the statutory phrase 'all questions of constitutionality' may trench upon a court's independence in the manner and scope of its decisionmaking." *Id.* *See Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 51 (2d Cir. 1980). There is also some question whether Congress intended to restrict the en banc review provision to actions *instituted* to challenge the constitutionality of the FECA and instituted by the three types of plaintiffs listed in the first sentence of section 437h(a). *See Bread Political Action Committee v. Federal Election Commission*, 591 F.2d 29, 33 (7th Cir. 1979) (holding that the en banc review provision applies only to actions "brought expressly to challenge the [FECA] on constitutional grounds," but that the provision may be invoked by plaintiffs other than those of the three named types).[3]

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3 We note that not even the Federal Election Commission has a firm and principled position on this issue. The Commission argued in the present case that the panel had no authority to rule on Lance's first amendment challenge to the Act on the ground that "2 U.S.C. §437h requires that 'questions of the constitutionality' of the Federal Election Campaign Act must be heard by the court of appeals, *en banc*, with direct appeal of the decision of the *en banc* court to the Supreme Court." Supplemental Brief for Federal Election Commission at 12, n.6. After the panel had agreed with the Commission and had sent the case to this court, the Commission switched positions and argued: "The extraordinary judicial review mechanism of 2 U.S.C. §437h which requires that certain cases be heard by the courts of appeals sitting *en banc* was improperly invoked in the context of this subpoena enforcement action. The legislative history of section 437h as well as the prior cases brought under the provision demonstrate that the panel

The sparse legislative history of section 437h provides little guidance for the resolution of these issues.[4] The Ninth Circuit interpreted the legislative history as follows:

> [Section 437h] originated as an amendment offered by Senator Buckley to expedite authoritative Supreme Court determination of the Act's constitutionality. The en banc requirement apparently was deemed to be an expediting mechanism due to a misconception that an en banc hearing was a matter of right following a hearing by a panel of three appellate judges; to require an initial en banc hearing was thus thought to eliminate a merely "preliminary" three-judge hearing. . . . That proposition is, of course, inaccurate: en banc hearings are discretionary. *See* Fed.R.App.P. 35(a). It has been suggested that the effect of an en banc requirement may be to impede rather than expedite. We are not prepared to say that has occurred in the instant case, but if mandatory en banc hearings were multiplied,

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erroneously concluded that this court is required by 2 U.S.C. §437h to determine the constitutionality of section 441b sitting *en banc*." Supplemental Brief to the Court of Appeals *En Banc* for Federal Election Commission at 14.

4 The legislative history of section 437h is succinctly set out in the district court's opinion in *Buckley v. Valeo*, 387 F.Supp. 135, 139-41 (D.D.C. 1975), *certified to en banc court*, 519 F.2d 821 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

> the effect on the calendars of this court as to such matters and as to all other business might be severe and disruptive.

California Medical Association, slip op. at 3386, at ____ (citations omitted).

We agree with the Ninth Circuit that "delicate questions" such as those raised by section 437h "are to be decided only when necessary." *Id.* Therefore, as the Ninth Circuit has done, we shall let our decision to hear the case en banc rest on our discretionary power under Fed.R.App.P. 35. *Id.*[5]

III

Since we have decided to treat this case under Rule 35, there is no doubt, as there might be if we were to rely on section 437h, that we may consider *all* the issues in this case and not just Lance's challenge to the facial constitutionality of the FCPA.

We adopt in full those portions of the panel opinion rejecting Lance's arguments that the subpoena should

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5 Our authority to take this case en banc pursuant to Fed.R.App.P. 35 is even more certain than was the Ninth Circuit's in *California Medical Association*. In *California Medical Association*, the district court certified the case directly to the en banc court without ruling on the merits. Arguably, the district court's order certifying the case was not an appealable "final order." In the present case, however, the district court clearly entered a final order — the order enforcing the subpoena — so there is no doubt that the ordinary rules governing appeals may be invoked.

be quashed because (1) the statute of limitation bars the investigation; (2) the FEC has no jurisdiction to investigate violations of the FCPA that occurred prior to 1975; and (3) the subpoena is unduly burdensome and harassing. We conclude, however, that the panel should not have reached the merits of Lance's ex post facto clause claim because the claim is not ripe for adjudication.

The Supreme Court stated the general rule for determining ripeness in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937):

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

See International Tape Manufacturers Association v. Gerstein, 494 F.2d 25, 27 (5th Cir. 1974). An important factor in considering ripeness is whether the tendered issue involves "uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." 13 Wright, Miller & Cooper, Federal Practice and Procedure §3532 (1975).

In arguing that the Commission's investigation violates the ex post facto clause, Lance notes that the Commission's petition for enforcement of the subpoena expressly states that the subpoena was issued incident to an investigation under section 441b. Section 441b was enacted in May, 1976; the suspected violations occurred in 1974 and 1975. It is clear, Lance argues, that the ex post facto clause bars a prosecution founded on transactions that occurred prior to the date of the statute's enactment. Since the investigation could not result in the issuance of a complaint, the subpoena does not meet the requirement of *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1946) that it be a part of an investigation "for a lawfully authorized purpose, within the power of Congress to command." Brief of T. Bertram Lance at 25.

We are unable to agree with this argument. A statute does not run afoul of the ex post facto clause unless it " 'makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or . . . '*aggravates* a *crime*, or makes it *greater* than it was, when committed.' " *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964), *quoting Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). Lance's argument demands that we first assume that any future FEC proceeding against the subjects of the investigation would *necessarily* depend solely on transactions that occurred before the enactment of section 441b. Lance contends

that the record is clear that no unlawful contributions, in the form of overdrafts or other payments, could have been made later than the enactment of the statute. The "record" to which Lance refers consists of briefs, affidavits, and other documents that Lance has submitted to the court. As the FEC correctly observes, he seeks to substitute his own unsworn assertion that no violations could have occurred later than January, 1975, for a judgment based on evidence assimilated through an FEC investigation. We are not, however, "free to speculate about the possible charges that might be included in a future complaint, and then to determine the [validity] of the subpoena requests by reference to those hypothetical charges." *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir.) (en banc), *cert. denied, sub nom. Standard Oil Co. of California v. FTC*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). *See also: Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 216, 66 S.Ct. at 509. Since Lance's ex post facto argument would require us to deliver an opinion "advising what the law would be upon a hypothetical state of facts," *Aetna Life Insurance Co. v. Haworth*, 300 U.S. at 241, 57 S.Ct. at 464, we dismiss the claim as unripe.

There is one other reason why the claim is unripe. Lance's claim depends on a finding that 2 U.S.C. §437g, which sets out remedies that the FEC may seek for violations of 441b, is a *criminal* statute. Section 437g authorizes a broad range of remedies for violations of 441b. For example, the Commission may seek an informal conciliation agreement, or it may bring an

action for an injunction or a fine not greater than five thousand dollars or an amount equal to the contribution or expenditure involved in the violation. The statute explicitly states that the cause of action and the possible penalties are "civil." Section 437g(a)(5)(D) expressly provides for a referral of criminal proceedings to the Department of Justice. Lance argues that the remedies available to the Commission must, nevertheless, be regarded as "criminal in nature." It is conceivable, we think, that some of the remedies available to the Commission are "criminal in nature," but it is obvious that others are "civil." To analyze Lance's ex post facto claim, we would have to *assume* that the present investigation will culminate in proceedings to impose penal-type sanctions against Lance. Because it is uncertain whether these events will occur precisely as Lance anticipates, the claim is not mature.

IV

Lance's only remaining argument against enforcement of the subpoena is that section 441b is facially unconstitutional, and that Congress is therefore unable to authorize its enforcement.[6] He relies most heavily on *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which was decided after Lance filed his appeal from the district court's

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6 We agree with the panel that Lance should be permitted to challenge the constitutionality of the Act even though he failed to do so in the district court proceedings. *See* slip op. pp. 3381-3382, pp. ___ - ___, *supra*.

enforcement order, and *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The panel summarized Lance's argument as follows:

> In *Buckley v. Valeo*, the Supreme Court held unconstitutional the FECA's $1,000 per candidate ceiling on political "expenditures" in federal elections. Two years later, in *First National Bank of Boston*, the Court held unconstitutional as violative of the first amendment a Massachusetts statute prohibiting "business corporation[s] incorporated under the laws of or doing business in the Commonwealth" from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters . . . ." 435 U.S. at 768 n.2, 98 S.Ct. at 1412 [55 L.Ed.2d 707]. Dissenting in *First National Bank of Boston*, Justice White warned that the combined effect of *Buckley v. Valeo* and *First National Bank of Boston* was simply "to reserve the formal interment of the Corrupt Practices Act . . . for another day." 435 U.S. at 821, 98 S.Ct. at 1439 [55 L.Ed.2d 707]. Lance urges that Justice White was correct and that the day has arrived.

Federal Election Commission v. Lance, at 374.

Lance's first amendment attack is directed against section 441b as a whole. The first question we must re-

solve, then, is whether Lance has standing to challenge the entire statute. We conclude that he does not.

Section 441b is not written as a single, broad injunction. Rather, it is a series of discrete, separable prohibitions. One distinct prohibition, of course, is the provision making it unlawful for a national bank to make "a contribution or expenditure in connection with any election . . . ." 2 U.S.C. §441b(a) (1976).

Congress clearly intended the prohibitions of the statute to be severable. Section 454 of the FECA is a severability clause enacted to avoid the invalidation of the entire statute if the courts strike down any portion as unconstitutional:

> If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

The FEC investigation that generated the subpoena is founded on the Comptroller of the Currency's reports that the Lance campaign committee had been given bank loans, or overdrafts, out of the ordinary course of banking business. *Supra* slip op. at 3380, at ____. It is on the basis of these reports that the Commission rested its finding of "reason to believe" that the Act had been violated. *Id.* slip op. at 3380-3381, at ____-

____. The only portion of the Act that the Comptroller's reports suggest may have been violated is the portion prohibiting banks from making loans to political candidates except in the ordinary course of business. Neither Lance nor the Commission suggests that any reason exists to suspect that the subjects of the investigation may have violated any other part of the Act. Thus, the only part of the Act with which the investigation is concerned at this time is the prohibition against bank loans made out of the ordinary course of business.

We have no doubt that Lance has standing to challenge that particular prohibition, but we find that he does not have "such a personal stake" in the constitutionality of any other portion of the Act "as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

Lance argues that this general standing requirement of "injury in fact" does not preclude his attacking section 441b as a whole because of the exception for first amendment challenges to overbroad statutes. *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We do not believe that the overbreadth doctrine is applicable in the present case. The Supreme Court has described the doctrine as follows:

> [T]he Court has altered its traditional rules of standing to permit — in the First Amendment area — "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister*, 380 U.S. at 486, 85 S.Ct. at 1121 [14 L.Ed.2d 22]. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).

The Supreme Court emphasized in *Broadrick* that the doctrine must be employed sparingly:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Applica-

> tion of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

Id. at 613, 93 S.Ct. at 916.

Our initial problem in finding that Lance may invoke the overbreadth doctrine to attack prohibitions under section 441b that are concededly inapplicable to his conduct, is that each section 441b prohibition is discrete and separable from the others. *Supra* slip op. at 3384-3385, at ____-____. We have reviewed the many overbreadth cases to which Lance's brief refers us; in each of these cases, the court was concerned with overbroad prohibitions not amenable to narrowing. Here, however, Lance argues not that the prohibition applicable to him is overbroad and incapable of being narrowed, but that other prohibitions, tied to the one to which he is subject only by their inclusion in a common statutory scheme, are unconstitutional. Even if Lance is correct that these other prohibitions may be unconstitutional, we do not see how this helps Lance, since our invalidation of them would still leave the particular prohibition applicable to Lance standing and enforceable.

Further, the rationale of the overbreadth doctrine is simply not apposite in the context of a challenge to section 441b. The rationale is that the mere existence of overbroad legislation regulating speech will "chill" expression by causing some persons not before the court to refrain from exercising their first amendment rights. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). It is reasonable to suppose that even if section 441b were overbroad it would not have a "chilling effect" substantial enough to justify invoking the overbreadth exception to the standing rule, since no one need risk criminal or civil penalties to test the statute's constitutionality. Section 437h specifically provides that any voter, as well as the Commission or any national political party, may bring a declaratory judgment action to challenge the statute.

Finally, Lance should not be allowed to use the overbreadth doctrine in this subpoena enforcement proceeding. We have, in the past, held that "the scope of issues which may be litigated in an [subpoena] enforcement proceedings must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *FTC v. Texaco*, 555 F.2d 862, 873 (5th Cir. 1977). We think that allowing an overbreadth attack against the entire statute here would be at odds with our understanding of the appropriate role of the courts in determining whether a subpoena should be enforced.

In light of these considerations, we hold that Lance has standing to challenge section 441b only as it prohibits banks from making loans, or permitting overdrafts, in connection with an election and out of the ordinary course of business. As to that specific challenge to section 441b, we find Lance's claim unpersuasive.

V

The Supreme Court's opinion in *Buckley v. Valeo* indicates that there exist important differences, for purposes of first amendment analysis of statutes regulating campaign speech, between "contributions" and "expenditures." An expenditure, according to the *Buckley* approach, is a payment to a third party for the purpose of influencing the outcome of an election. Examples of such independent expenditures include the costs of distributing handbills or leaflets, the financing of speeches or rallies, and the financing of television or radio publicity. 424 U.S. at 19, 96 S.Ct. at 635. A contribution, on the other hand, is a direct payment to a candidate or campaign committee. Unlike the contributions the Court considered in *Buckley*, however, the overdrafts made to the Lance campaign committee out of the ordinary course of business had no speech elements at all. Because the overdrafts, according to the Comptroller's reports, were made out of the ordinary course of business, they were inherently private or secret, and were therefore not the sort of public expression of support for Lance and his views that would make them even "symbolic speech." Since we find no significant

speech elements in the transactions that the Commission is investigating, we hold that the FCPA's prohibition of such unsound banking practices in connection with elections does not violate the first amendment.[7]

VI

Lance next argues that section 441b is unconstitutionally vague. It has, of course, long been settled that "the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). According to Lance, section 441b's prohibition against making contributions or expenditures "in connection with any election" fails sufficiently to inform him of the boundaries of the proscribed conduct because of the vagueness of the phrase "in connection with any election." Thus, Lance contends that the statute is constitutionally infirm.

We do not, however, think it proper to resolve the merits of Lance's vagueness challenge at this time. The vagueness doctrine has been developed in the context

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7 We intimate no opinion concerning the constitutionality of any of the other prohibitions set out in section 441b. If the scope of the present FEC investigation expends to cover transactions suspected of violating any of the other prohibitions, Lance or one of the other subjects of the investigation — or even a third party subpoenaed to give testimony — might well, then, have standing to challenge those other prohibitions.

of, and it is applicable to, penal statutes. When a statute imposing civil penalties is claimed to be vague, we believe a court's proper role is to construe the statute's language, if possible, and then apply the statute as construed. Viewed this way, Lance's vagueness argument is simply inapposite unless the FTC seeks to proceed against him in a criminal proceeding. As we have earlier indicated in our analysis of Lance's ex post facto argument, we are unwilling to assume that the present investigation of Lance will result in his criminal prosecution. *Supra* slip op. at 3384 at ____. Accordingly, we find Lance's vagueness argument presently unripe for adjudication and do not consider it on this appeal.

VII

Lance's final argument is that section 441b, by imposing greater restrictions on national banks than on certain other entities, establishes a scheme of disparate treatment of banks that is impermissible under the fifth amendment. We consider this argument only in the context of the prohibition Lance has standing to challenge: that banks may not make political contributions in the forms of overdrafts, loans, and extensions of credit, out of the ordinary course of business.

To evaluate this equal protection claim of Lance's, we must first decide the appropriate test of the statute's validity under the equal protection component of the fifth amendment. Lance suggests that because speech,

a fundamental right, is involved, this court must strike down section 441b unless it finds that the statute "imposes a selective restriction on expressive conduct [no] greater than is essential to the furtherance of a substantial governmental interest." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 102, 103, 92 S.Ct. 2286, 2293, 2294, 33 L.Ed.2d 212 (1972). But because we have already concluded that the Banks' contributions contain no cognizable elements of speech, *supra* slip op. at 3386-3387, at ____, we think the statute must be upheld if there is a rational relationship between the prohibition Lance has standing to challenge and the purpose that prohibition serves. *See Marshall v. United States*, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Since we have no difficulty in concluding that a prohibition against banks engaging in unsound banking practices is rational, we reject Lance's equal protection claim.

VIII

Because we conclude that the provisions of section 441b that Lance has standing to challenge are not facially unconstitutional and that none of Lance's other objections to the subpoena have merit, we affirm the order of the district court enforcing the subpoena.

AFFIRMED.

COLEMAN, Chief Judge, with whom GARZA, TATE and THOMAS A. CLARK, Circuit Judges, join, dissenting:

It seems obvious that Congress did not intend to authorize or empower THE FEDERAL ELECTION COMMISSION to regulate or investigate *state* elections. As to elections *per se*, the very name of the Commission delineates the scope of its jurisdiction. The Act names no offices except elective federal offices. Except for enforcing applicable federal constitutional amendments governing the franchise, Congress may not usurp the regulation and supervision of state elections. That would be a blatant rupture of the federal system ordained by the Constitution.

The Commission offers no claim to the contrary. It says that it is only investigating what may have been illegal loans by national banks for the purpose of influencing the outcome of an election.

Here, the election took place in 1974. The statute was not then in effect. Some of it became effective on January 1, 1975 and other parts were not enacted until 1976. Prior to January 1, 1975 there was no authority for civil enforcement of the prohibition against loans of the type here in question, *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 2086, 45 L.Ed.2d 26 (1975).

The statute, non-existent in 1974, subjects Lance to a "civil" penalty of from $5,000 to $600,000, depending on the existence or non-existence of wilfulness. The majority opinion says that the *ex post facto* features of this situation are not ripe for adjudication because the Commission might not seek such a fine. This reads

the *ex post facto* prohibition too restrictively. I believe that the prohibition applies to the hazard as well as the fact. I cannot agree that one may be made to run the gauntlet on the argument that, after all, he may not get hurt.

The simply stated, easily understood, demand of Article I, section 9, clause 3 of the Constitution is that Congress may not alter the existing situation of an individual to his disadvantage, *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898); *Burgess v. Salmon*, 97 U.S. 381, 24 L.Ed. 1104 (1878).

In any event, to subject a person to a deposition and the production of documents while he is kept in the dark as to what the government is actually driving at in the way of consequences would be, I think, an impermissible denial of due process.

Taking judicial notice of the records of the U.S. District Court for the Northern District of Georgia, in this Circuit, and the applicable statutes of limitations in federal criminal prosecutions, we need not close our eyes to the known fact that criminal prosecution is no longer a possibility in this case. The only hope of punishing Lance and his associates in this matter, or otherwise putting them to a disadvantage by the necessity for employing attorneys, etc., is to use the procedure which the Commission now seeks to invoke and which it would have this Court to enforce.

I see no point in abstractions or a lot of judicial dancing around. Going straight to the point, I would hold that Lance may not now be required to respond to these subpoenas. I would certainly extend the denial to anything which took place after election day, August 13, 1974, because it would not have been done for the purpose of influencing the election, which is the *sine qua non* of the legislation.

The majority opinion concedes that the matter in question has been exhaustively investigated by other agencies of the Government — not once but twice. There is no suggestion that the product of these investigations is unavailable to the Federal Election Commission. Therefore, I would deny enforcement on the additional ground that the subpoena amounts to nothing more than unnecessary harassment.

My view of the case, if correct, makes it unnecessary to reach or decide the constitutionality of the Act as to conduct taking place after its effective date.

I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellee,

versus Case No. 78-1859

T. BERTRAM LANCE,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that T. Bertram Lance, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1981, which affirmed the order of the district court directing appellant to testify in response to a subpoena served upon him by the Federal Election Commission.

This appeal is taken pursuant to 2 U.S.C. §437h(b).

/s/ Emmet J. Bondurant
Emmet J. Bondurant

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Appellant T. Bertram Lance

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served the within and foregoing Notice of Appeal to the Supreme Court of the United States by mailing copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

Solicitor General
United States Department of Justice
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Charles N. Steele, Esq.
General Counsel
Federal Election Commission
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Kenneth J. Guido, Jr., Esq.
Common Cause
2030 M Street, N.W.
Washington, D.C. 20036

This 29th day of January, 1981.

/s/ Emmet J. Bondurant
Emmet J. Bondurant

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served the within and foregoing Jurisdictional Statement by mailing copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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This ____ day of April, 1981.

Emmet J. Bondurant